IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 3298
October Term, A. D. 1923.

IN THE MATTER OF WILBUR ERSKINE, BANKRUPT.

HARRY W. VOSS, AS TRUSTEE OF THE ESTATE OF WILBUR ERSKINE, BANKRUPT, *Petitioner*, *v.* HAROLD TAYLOR, TRUSTEE UNDER THE WILL OF MARY E. ERSKINE, DECEASED, AND WILBUR ERSKINE, *Respondents.*	Original Petition to Review and Revise an Order of the United States District Court for the District of Indiana.

RESPONDENT'S PETITION FOR REHEARING.

To the Honorable Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

The undersigned, your petitioners, respectfully submit that each of them has been aggrieved by an opinion of your

Honors rendered herein on the 20th day of June, 1924, in the respects hereinafter set forth and each prays for a rehearing of said matter upon the following grounds:

1. It is respectfully urged that Section 4 of the Act of September 6, 1916, (39 U. S. Statutes at large, at page 727; Section 1649a, U. S. Compiled Statutes 1916), cannot properly be extended by judicial construction to include statutory proceedings known as "petitions to review and revise in matter of law" provided for in the Bankruptcy Act, and which procedure is made applicable only to bankruptcy proceedings, and not to controversies arising in bankruptcy proceedings.

2. It is respectfully urged that Section 4 of the Act of September 6, 1916, (39 U. S. Statutes at large at page 727; Section 1649a U. S. Compiled Statutes 1916) is only intended to be corrective as to mistakes made in the two procedures named under the general Judicial Code; between (a) Writs of error, which is the procedure to be followed in obtaining appellate review in law suits; and (b) Appeal, which is the procedure provided for obtaining appellate review in equity proceedings. That this statute is plainly due to the influence of Code pleading in Code States as to the general law and equity practice, and the tendency to drop the distinctive forms of procedure in the Code States. But that said Section 4 can have no application to Special Statutory proceedings provided for special purposes and procedures, such as the Petition to Review and Revise under 24b of the Bankruptcy Act and known only to Bankruptcy proceedings, and confined strictly to the proceedings and not applicable to controversies arising in bankruptcy such

as is here involved and reviewable only by appeal under 24a of the Bankruptcy Act.

In Federal procedure concerning appeals in equity, there is no statutory provision analagous to the Petition to Review and Revise—Section 24b of the Bankruptcy Act. So held by this Court *in Re Parker*, 283 Fed. 404, 406, decided December 28, 1921. Therefore it is respectfully submitted that it would be against the established rules of construction to extend and broaden the language and scope of Section 4 to include within its terms and meaning this special statutory proceeding of 24b of the Bankruptcy Act; That the Court erred in giving by its construction such meaning to said Section 4 to include Petitions to Review and Revise under Section 24b.

3. It is further respectfully urged that the Court erred in holding that the petition to review and revise should not be dismissed because of the provision of Section 4 of Act of September 6, 1916, (39 U. S. Statutes at large at page 727; Section 1649a, U. S. Compiled Statutes 1916.)

4. The Court in its original opinion herein states the following:

> "Controversies arising in bankruptcy are lawsuits of the same kind and quality as other lawsuits not involved in bankruptcy. All such cases come to this court by appeal or writ of error, and we are of opinion that the use made of the terms 'appeal' and 'writ of error' should not be held to be a limitation upon what seems to be the broad command of the act not to dismiss a case merely because the remedy was misconceived *especially where, as here, the record before us is in all respects the same as it would be on appeal.* We shall consider the matter as here on appeal."

It is respectfully urged that the Court is in error in the statement that "the record before us is in all respects the same as it would be on appeal." In an appeal there would be an order of this court or of the District Court allowing the appeal and a certified copy of the complete record of the District Court, certified to by the Clerk of that court. In the case at bar there is no such order of either court and no such certified copy of the record. This case came to this court on an original petition to review and revise, filed June 18, 1923, and the only paper that was filed in this court was the original petition to review and revise with accompanying exhibits. That original petition to revise is not a record on appeal as required by law. It is merely petitioner's petition to review and revise. Respondents promptly, on July 7, 1923, moved to dismiss said original petition to review and revise on the ground, among others, that no appeal had been asked for or granted or taken. And in ample time for them to have taken an appeal and filed a record on appeal. On September 11, 1923, petitioner filed in this court his petition to complete the record and this court made the following order:

> "On motion of counsel for petitioner, it is now ordered that the following certified copies of certain parts of the record in this cause be filed and made a part of the petition to review and revise heretofore filed in this Court, subject to the objection of the respondents:
>
> "1. Trustee's amended petition filed in cause No. 625 in the matter of Wilbur Erskine, Bankrupt, on May 27, 1922, Charles A. Burnett, Referee in Bankruptcy.
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> "2. Answer of Wilbur Erskine and Harold Taylor, Trustee, filed June 26, 1922, with Charles A. Burnett, Referee in Bankruptcy.

"3. Petition for review and assignment of errors of Harry W. Voss, Trustee in Bankruptcy of the Estate of Wilbur Erskine, filed March 21, 1923, with Charles A. Burnett, Referee in Bankruptcy."

After the filing of those additional papers on September 11, 1923, there was no record on appeal on file in this court. The only papers on file in this court in this cause then and now consist of an original petition to review and revise, with the exhibits thereto attached, including the parts of the record attempted to be filed and made a part of the petition to review and revise by the order of September 11, 1923. The filing in this court of an original petition to review and revise is not the filing of a record on appeal. It is a petition by petitioners and is not a record in the sense that the term record is used when we speak of filing a record on appeal. If respondents are correct in this then this court never had and has not now jurisdiction of this cause.

6. It is respectfully urged that the court is in error in the statement in its opinion that "Respondent Taylor, trustee, repudiates the suggestion of petitioner that he claims any title under the Indiana Judicial Sales Act of 1875." It is true that counsel for respondents sought by argument in the original brief herein to support the judgment of the District Court, which judgment gave a greater interest to respondents than that given by the Judicial Sales Act of 1875, but by seeking to support the judgment of the District Court they did not intend to forego or waive any right that either respondent has under the law, and it is suggested that the respondents ought to be given whatever rights the law gives them. The attention of the court is called to

the statement on page 12 of respondents' original brief herein as follows:

> "There is no question in the minds of counsel that if the Judicial Sales Act of 1875 was to be held as here applying, then the interest of the wife would be one-fourth of $20,000.00 or $5,000.00, and that it would be subject to the further section of the same Act providing that the husband would inherit."

The foregoing statement was intended as a recognition by counsel that it was for the court to say whether or not the Judicial Sales Act applied and, if it does apply, save that right for respondents.

If the Judicial Sales Act applied the interest in the real estate vested in the wife upon the adjudication, passed to her husband by descent upon her death by virtue of that statute, if no effect is to be given to her last will.

Haggerty v. Byrne, 75 Ind. 499, 503;
Hurst v. Mann, 51 Ind. App. 466;
Davis v. Kelley, 179 Ind. 13.

However, in the case at bar the wife devised all of her real estate to respondent Taylor, Trustee, so that her interest in the real estate, if the Judicial Sales Act does apply, belongs to respondent Taylor, Trustee, by virtue of her will.

Bradley v. Thixton, 117 Ind. 255.

By Statutes of Indiana, the wife has an absolute right to dispose of by will all her property, real and personal, to any person or corporation capable of taking same.

Sections 3112-3113 Burns' Rev. Stat. 1914.

By an act of 1907, (Sec. 3046 Burns R. S. 1914,) where a wife leaves a will which makes any provision for the husband, the husband takes under the will, and takes nothing from his wife's estate by reason of any law of descent of the State of Indiana, unless he make election to retain his rights under the law. To elect to take under the law he must record his written election in Clerk's office where will is probated. The right of election is a purely personal one. No one else can exercise it nor can it be controlled by others. There is no claim here that the husband, respondent, made any such election, and we assume there will be no question made as to the wife's will controlling. This we understand to be the effect of the statement found in the original brief in support of the original petition herein as appears in the petitioner's third proposition submitted to the court, at page 11, Brief for Petitioner, only questioning the amount of the recovery.

7. It is respectfully urged that if this Honorable Court has understood that the respondent, Taylor, Trustee, "repudiates the suggestion of petitioner that he claims any title under the Judicial Sales Act of 1875," meaning that said respondent was refusing to take under said statute in the event the Court were of the opinion and should decide that said statute controlled the title of said respondent's decedent, then there has been a misunderstanding as to the position of respondents in this matter affecting said decision, and that therefore the court did not consider the effect of the Judicial Sales Act of 1875, then there was and is a misunderstanding of these respondents' position which seriously injured their rights herein, and would leave this case without a proper determination. Respondent's position

has been all along that the general statutes providing dower interest in the husband's real estate controls the interest of respondent's decedent in this matter and which vested in her under section 70a of the Federal Bankruptcy Act and the Decisions construing the same, and counsel have urged such contention, believing they were justified in that position under the law, but never with any thought of any disclaimer or that it was not a question that was before the court to decide.

It is further respectfully urged that, even if the court is of the opinion that Respondent, Taylor, Trustee, has repudiated any claim under the Judicial Sales Act, justice requires that the court determine what right, if any, the respondents have under that act, for it cannot be that the court will fail to preserve any rights that parties may have because of language used in a brief when it is apparent that the parties are seeking to have determined whatever rights they may have.

8. It is further respectfully urged that for the court to hold in effect that because there is a right of composition the title does not vest as of date of adjudication regardless of whether the composition is or is not effected, is erroneous and contrary to the express language of the statute and the constructions placed thereon by the Supreme Court and Courts of Appeal of the United States. The right of composition which may be exercised after adjudication would be no more than a condition subsequent which if it does not happen, has no effect upon the previous title duly obtained. It would not be possible for the law to be effective and indulge in uncertainties as to titles of real estate. The Federal Bankruptcy Act contemplates an entire separation of

the titles of husband and wife, as of date of adjudication. It gives no power to the trustee to take the wife's dower interest. It leaves it to her and makes it to vest in her as of that date. Whether this is to be treated or spoken of as though there was a civil death or just the meaning and effect of the Bankruptcy Act, would make no difference; the result is the same. In Indiana the wife's inchoate interest is an absolute fee, the old common law dower having been abolished. And the title vests accordingly as of the date of adjudication. There is no claim made and certainly the decision of the United States Supreme Court in *Porter v. Lazear* would prevent such claim that a purchaser at a bankruptcy sale takes the wife's inchoate interest commonly spoken of as her one-third (1-3) dower interest with right of possession. It is not contended that such purchaser takes it subsequently. The policy of the Bankrupt law would forbid such a rule. The trustee takes the property for the benefit of the creditors, not for the benefit of the purchaser. If a purchaser was buying, subject to a possibility of obtaining the dower interest in the future, there would be small probability of its increasing the price in the trust fund, so that it would be punishment to the bankrupt, his creditors, and his family and benefit only the purchaser. But as a matter of fact, no one takes the wife's dower interest through the trustee in bankruptcy without consent of the wife. It must go by some act of the wife by way of joining in the conveyance or giving consent to the sale and to the conveyance by the trustee. This must be done either by herself or her authorized representative and this is the only way in which her interest is to be divested or conveyed. Is this requirement without meaning? If it has meaning, as

tinguished. In the face of the foregoing policy of the law it is submitted that that result is so obviously unfair as to shock the conscience. At the time of the oral argument in the District Court the learned judge of that court stated that that result would be unfair, for to take from the heirs or devisees of this wife because of her death, the death having occurred after the adjudication, that which she would have had if she had lived is to give to the creditors that which they were not entitled to on the date of the adjudication and to take from the wife or her family that which she was entitled on the date of the adjudication.

Wherefore, upon the foregoing grounds, these respondents and petitioners do respectfully pray this Honorable Court that a re-hearing may be granted of said cause and that the mandate of this court may be stayed pending the disposition of this petition.

Respectfully submitted,

HAROLD TAYLOR, Trustee, under the will of Mary E. Erskine, deceased, and Wilbur Erskine.
Respondents-Petitioners.

By
DANIEL H. ORTMEYER,
HAROLD TAYLOR,
Their Attorneys.

I, Harold Taylor, of counsel for respondents and an attorney regularly admitted to practice in the United States Circuit Court of Appeals for the Seventh Circuit, do certify

that in my opinion, the foregoing petition for re-hearing in the matter of Wilbur Erskine, Bankrupt, Harry W. Voss, as Trustee of the estate of Wilbur Erskine, Bankrupt, Petitioner, against Harold Taylor, Trustee under the will of Mary E. Erskine, deceased, and Wilbur Erskine, No. 3298, is well founded and is not presented for the purpose of creating a delay.

HAROLD TAYLOR.

Subscribed and sworn to before me, a Notary Public, in and for Marion County in the State of Indiana, this 4th day of August, 1924.

My commission expires Nov. 25, 1926.

(Notarial Seal)

WALTER J. TINGLE,
Notary Public.

And afterwards, to wit: On the fifteenth day of August, 1924, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

Friday, August 15, 1924.

Court met pursuant to adjournment.

Present: Hon. Samuel Alschuler, Circuit Judge, presiding; Hon. Evan A. Evans, Circuit Judge; Edward M. Holloway, Clerk.

Before Hon. Samuel Alschuler, Circuit Judge; Hon. Evan A. Evans, Circuit Judge; Hon. George T. Page, Circuit Judge

3298

In the Matter of WILBUR ERSKINE, Bankrupt

HARRY W. VOSS, as Trustee of the Estate of Wilbur Erskine, Bankrupt,

vs.

HAROLD W. TAYLOR, Trustee under the Will of Mary E. Erskine, Deceased, and WILBUR ERSKINE

Original Petition to Review and Revise an Order of the District Court of the United States for the District of Indiana

It is ordered by the court that the petition for a rehearing in this cause be, and the same is hereby denied.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 56, inclusive, contain a true and complete transcript of the record in the United States Circuit Court of Appeals for the Seventh Circuit in the matter of Wilbur Erskine, bankrupt; Harry W. Voss, Trustee of the estate of Wilbur Erskine, Bankrupt, vs. Harold Taylor, Trustee under the will of Mary E. Erskine, Deceased, and Wilbur Erskine, No. 3298, October Term, 1923, as the same remains on the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this Eighteenth day of September, A. D. 1924.

Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit. (Seal of the United States Circuit Court of Appeals, Seventh Circuit.)

IN SUPREME COURT OF THE UNITED STATES

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

ORDER GRANTING PETITION FOR CERTIORARI—Filed March 2, 1925

On consideration of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the Seventh Circuit, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.